INDEX

	Page
Opinion below	1
Jurisdiction	1
Statute involved	2
Question presented	3
Statement	4
The question is substantial	7
Conclusion	13
Appendix	1a

CITATIONS

Cases:

Frisco Transportation Company Extension, 53 M.C.C. 415	11
Greyhound Corporation Extension, 46 M.C.C. 775	12
Motor Rail Co. Application, 49 M.C.C. 109	12
Petroleum Carrier Corp. v. *Black*, 51 M.C. 717	12
Riss & Company v. *United States*, 110 F. Supp. 468, affirmed, 342 U.S. 937	12
Santa Fe Trail Transp. Co. Extension, 46 M.C.C. 775	12
Smith Bros. Revocation of Certificate, 33 M.C.C. 465; 42 M.C.C. 211	12
United States v. *Capital Transit Co.*, 325 U.S. 357	2
United States v. *Great Northern R. Co.*, 343 U.S. 562	2
United States v. *Pennsylvania R. Co.*, 323 U.S. 612	2
United States v. *Seatrain Lines*, 329 U.S. 424	11
West Coast Fast Freight v. *United States*, 205 F. 2d 249; 42 M.C.C. 211	9

Statute:

Interstate Commerce Act, 24 Stat. 379, as amended, 49 U.S.C. 301 *et seq.*:	
Sec. 207(a)	2, 7
Sec. 208	9
Sec. 212(a)	2, 9

Miscellaneous:

Rule 60(a), Federal Rules of Civil Procedure	12

In the Supreme Court of the United States

OCTOBER TERM, 1955

No. —

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, APPELLANTS

v.

WATSON BROS. TRANSPORTATION CO., INC.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEBRASKA

JURISDICTIONAL STATEMENT

OPINION BELOW

The opinion of the United States District Court for the District of Nebraska, Omaha Division, is reported in 132 F. Supp. 905. The court's opinion and decree are set forth in the Appendix, *infra*, pp. 1a-21a.

JURISDICTION

This suit was brought under 28 U. S. C. 1336 to set aside and enjoin enforcement of an order of the Interstate Commerce Commission. The decree of

the district court was entered June 27, 1955, and notice of appeal was filed in that court on August 25, 1955. The jurisdiction of this Court is conferred by 28 U. S. C. 1253 and 2101(b). The following decisions sustain the jurisdiction of this Court to review the instant decree on direct appeal: *United States* v. *Pennsylvania R. Co.*, 323 U. S. 612; *United States* v. *Capital Transit Co.*, 325 U. S. 357; *United States* v. *Great Northern R. Co.*, 343 U. S. 562.

STATUTE INVOLVED

The pertinent provisions of Part II of the Interstate Commerce Act, 24 Stat. 379, as amended, 49 U. S. C. 301 *et seq.*, are as follows:

> Sec. 207(a). Subject to section 210, a certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the operations covered by the application, if it is found that the applicant is fit, willing, and able properly to perform the service proposed and to conform to the provisions of this part and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, to the extent to be authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied: * * *
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> Sec. 212(a). * * * Any such certificate, permit, or license may, upon application of the holder thereof, in the discretion of the Com-

mission, be amended or revoked, in whole or in part, or may upon complaint, or on the Commission's own initiative, after notice and hearing, be suspended, changed, or revoked, in whole or in part, for willful failure to comply with any provision of this part, or with any lawful order, rule, or regulation of the Commission promulgated thereunder, or with any term, condition, or limitation of such certificate, permit, or license: *Provided, however,* That no such certificate, permit, or license shall be revoked (except upon application of the holder) unless the holder thereof willfully fails to comply, within a reasonable time, not less than thirty days, to be fixed by the Commission, with a lawful order of the Commission, made as provided in section 204(c), commanding obedience to the provision of this part, or to the rule or regulation of the Commission thereunder, or to the term, condition, or limitation of such certificate, permit, or license, found by the Commission to have been violated by such holder; * * *

QUESTION PRESENTED

Whether the Interstate Commerce Commission, having inadvertently issued a certificate to a motor carrier granting operating rights in excess of those which the Commission found to be required by public convenience and necessity, may without notice and hearing correct the certificate to make it conform to the findings.

STATEMENT

Appellee is a motor carrier whose certificate of public convenience and necessity, issued in 1947, authorized it to transport general commodities over approximately 84 separate regular and irregular routes, and dangerous explosives over 69 of those routes. In that year it applied to the Commission for added authority which would permit it to haul dangerous explosives over the remaining 15 routes.

During the hearing on this application, appellee, with the consent of the examiner and the other parties, orally amended it to include a request for authorization of service to four Army Ordnance plants which it was not then authorized to serve.[1] The examiner issued a report and order in which he found that the public convenience and necessity required granting appellee authority to transport "dangerous explosives" both over its existing routes, and to and from the four Army plants "as off-route points in connection with applicant's otherwise authorized operations."

No exceptions were filed to the examiner's report and, in accordance with settled practice, it became the Commission's report and order in May, 1949. However, the amended certificate which the Commission issued in July, 1949[2] did not restrict the

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[1] Appellee's counsel stated that "such amendment will not substantially broaden the scope of this application."

[2] The certificate, which was prepared by the Commission's clerical staff, was a long and complicated document which listed all of appellant's 84 routes throughout the Middle West.

carrier's authority to serve the four Army plants to hauling "dangerous explosives," but authorized it to transport "general commodities" (a broader category which includes explosives) to the plants as "off route points in connection with" its "authorized regular and irregular route operations."[3]

Four years later the Commission, without notice and hearing, issued a corrected certificate which authorized the carrier to haul Class A and B explosives to the four plants "in connection with [the] carrier's otherwise authorized regular route operations." The order amending the certificate recited that the grant of greater authority in the original certificate had been made "through inadvertence."

The carrier then filed suit before a three-judge district court to set aside the corrective order, and a majority of the court set the order aside. The court stated that the order 'purports to effectuate a change in an existing certificate"; that the "only statutory authority" for the "suspension, change or revocation" of a certificate is Section 212(a) of the Interstate Commerce Act which authorizes such action only after notice and hearing, and then only for willful violation of the Act; that the original certificate authorized the carrier to transport general commodities to the four points, but the amended certificate "restricts this authority" to the transportation of Class A and B explosives;

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[3] The certificate specifically authorized appellee to haul dangerous explosives over its remaining 15 routes.

and that the modification, having been made without notice and hearing and for reasons other than those permitted by Section 212(a), was invalid. The court stated that even if it were to "assume that the Commission has authority to correct clerical errors without notice and hearing," it would reach the same result since the Commission's action in this case "is more than the mere correction of a clerical error; and is an attempt made contrary to Sec. 212 to revoke and change a certificate duly issued."

Circuit Judge Johnsen, dissenting, stated that since Section 207(a) of the Act authorizes the Commission to issue a certificate only when it finds that the proposed service is required by the public convenience and necessity, any "purported * * * part of a certificate, which has been issued without such a finding as a basis for it, is legally void"; that the Commission found that public convenience and necessity required only that appellee be authorized to haul dangerous explosives to the four plants, and that there was no finding of public convenience and necessity "as to the hauling of any other commodities" to the plants; that Section 212(a) does not deny the Commission the "right to undertake to make an improperly issued certificate conform to the scope of the finding of public convenience and necessity made and required to underlie the certificate"; and that apart from Section 212(a) "there is no prescription otherwise in the statutes that requires the Commission to grant a hearing as a basis for the taking of the administrative action

by it to make the certificate here involved simply conform to the finding of public convenience and necessity existing in relation to it."

THE QUESTION IS SUBSTANTIAL

The district court set aside the Commission's order on the ground that it constituted "an attempt made contrary to Section 212 to revoke and change a certificate duly issued." But, as we shall show, the original certificate was invalid insofar as it purported to grant appellee the right to haul more than explosives, and the changes which the Commission made in that certificate merely conformed it to the operating authority which the Commission, in a formal report, had found was required by the public convenience and necessity. Such action, we submit, is not a "revocation" or a "change" of a certificate within the meaning of Section 212(a). It is simply the correction of an obvious inadvertency in the Commission's administrative process, and therefore can be done without notice and hearing.

1. Section 207(a) of the Act permits the Commission to grant a motor carrier a certificate only if it expressly finds, after hearing, "that the proposed service, to the extent to be authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied * * *." The Commission, on the record before it, found only that the public convenience and necessity required that appellee be certificated to carry dangerous

explosives to the four Army plants; it made no findings with respect to general commodities. Insofar as the certificate purported to grant the greater authority to carry general commodities, it was beyond the Commission's power and, as the Commission stated, was issued "through inadvertence."

The corrections which the Commission ordered in 1953 did no more than conform appellee's operating authority to that which the Commission was authorized to and intended to grant in 1949. The 1949 findings contemplated that appellee would be certificated to haul "dangerous explosives" to the four plants as "off-route points" in connection with its "otherwise authorized operations." The original certificate, however, inadvertently authorized appellee to haul "general commodities" to the plants as "off-route points" in connection with its "authorized regular and irregular route operations." The corrected 1953 certificate authorized the carrier to haul Class A and Class B explosives to the plants in connection with its "regular route operations."

The only change of substance which the Commission made in the original certificate was to cut back the erroneous "general commodities" authority to the intended "explosives" authority. The other two changes — that from "dangerous" to "Class A and B" explosives; and that designating the four Army plants as off-route points on "regular route operations" instead of on "regular and irregular route operations"—did not alter the carrier's operating rights. The new description of

the explosives merely reflects the fact that in 1950 the Commission changed the class designations of explosives from "dangerous," "less dangerous" and "relatively safe" to "Class A," "Class B" and "Class C," respectively, without changing the substance of the categories. See *West Coast Fast Freight* v. *United States,* 205 F. 2d 249, 251 (C. A. 9). Thus, authority in 1953 to haul Class A and Class B explosives was the same as authority in 1949 to haul "dangerous" explosives. And since "irregular route operations" are defined in Section 208 of the Act as those "not over specified routes or between fixed termini," the description of off-route points on irregular routes is meaningless. The Commission's 1949 finding that public convenience and necessity required service to the four plants as off-route points on appellee's "otherwise authorized operations" plainly was intended to grant the carrier the authority which it has under the amended certificate—the right to serve the plants as off-route points on its *regular* routes.

Since, as we have shown, the findings authorized the Commission to certificate appellee to carry explosives but not general commodities to the plants, the purported grant of the authority to haul more than explosives was invalid. We submit that the Commission was not required to proceed under Section 212(a) in order to correct the certificate to eliminate the authority which it had improperly included. That Section, in our view, deals only with changes in certificates validly issued, and not with corrections of clerical error.

Section 212(a) provides that certificates "shall

be effective from the date specified therein, and shall remain in effect until suspended or terminated as herein provided." It further provides that a certificate may be suspended, changed or revoked only after notice and hearing and only for willful failure to comply with the Act or any Commission regulation or order thereunder. And, before the Commission can revoke a certificate, it must give the holder 30 days within which to cease the violations. These provisions plainly were designed to protect the holders of *valid* certificates against change or revocation except in conformity therewith. They were not intended to, and do not, give a certificate holder the right to retain invalid operating authority which he received through inadvertence, merely because he has not otherwise willfully violated the Act. As Judge Johnsen stated in his dissenting opinion, a certificate "which has no legal substance or existence, from the lack of any power to grant it, would hardly have need to be 'suspended, changed or revoked' * * *" within the meaning of Section 212(a).

Although the court below did not in terms hold that the Commission cannot correct inadvertent error in a certificate without notice and hearing, it did state that the corrections here proposed would effectuate a change in an existing certificate, and that the "only statutory authority" for suspending, changing or revoking a certificate is Section 212(a). Since, as we have shown, the only change of substance made by the Commission was to cor-

rect the clerical error which gave appellee greater authority than it was entitled to, the practical effect of the decision below is to deny the Commission power to correct clerical error in a certificate unless it proceeds under Section 212(a). To deny such power to the Commission would mean that although the invalid certificate would be subject to successful challenge by a competitor of the carrier, the Commission itself could not correct the error unless it could show willful violations.

2. This Court has left open the question whether the Commission can correct inadvertent error in a certificate without notice and hearing. In *United States* v. *Seatrain Lines*, 329 U.S. 424, the Court found it unnecessary to "determine the Commission's statutory power to correct clerical mistakes" (p. 428), since it found that the issuance of the original certificate involved in that case "was not an 'inadvertent' error which the Commission's subsequent action was intended to correct" (p. 429). But in the instant case, as we have shown, the inadvertency is clear, and this case therefore directly presents the question which this Court did not reach in *Seatrain*.

In an agency as busy as the Commission, where a large number of certificates are prepared by clerks on the basis of Commission orders,[4] mistakes of this character are bound to occur. The Commission consistently has taken the position that it can correct clerical error in certificates without hear-

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[4] See *Frisco Transportation Company Extension*, 53 M.C.C. 415, 424-425.

ing,[5] and at least one district court apparently concurs in that view. See *Riss & Company* v. *United States*, 100 F. Supp. 468, 474 (W.D. Mo.), affirmed, 342 U.S. 937. The power of the Commission to correct inadvertent error is analogous to that of a court, under Rule 60(a) of the Federal Rules of Civil Procedure, to correct "of its own initiative" "[c]lerical mistakes in judgments, orders or other parts of the record * * *." The question whether the Commission has that power is an important one both to the Commission in the administration of the Interstate Commerce Act, and to other federal Agencies which administer similar statutory licensing provisions.

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[5] *E.g.*, *Santa Fe Trail Transp. Co. Extension*, 46 M.C.C. 775; *Greyhound Corporation Extension*, 46 M.C.C. 775; *Motor Rail Co. Application*, 49 M.C.C. 109. See, also, *Smith Bros. Revocation of Certificate*, 33 M.C.C. 465, 472; 42 M.C.C. 211; *Petroleum Carrier Corp.* v. *Black*, 51 M.C.C. 717, 720.

CONCLUSION

We submit that the question presented by this appeal is substantial and that it is of general public importance. It is therefore respectfully submitted that probable jurisdiction should be noted.

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